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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID S. HESS, MOTORCITY OF JACKSONVILLE, LTD., AND MOTORCITY OF JACKSONVILLE, INC.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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December 18, 1997

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QUESTION PRESENTED

Whether the court of appeals erred in holding that an "evolving" federal common law D'Oench doctrine can continue to be applied today to bar unquestionably proper state law claims against a failed thrift held in receivership by the FDIC, where the claims do not involve any assets of the thrift.

PARTIES

In addition to the named parties to this proceeding, other respondents include Southeast Bank, N.A. and David Feigenbaum.

LIST PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

Motorcity of Jacksonville, Ltd. and Motorcity of Jacksonville, Inc. have no parent companies or subsidiaries.

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IN THE
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DAVID S. HESS, MOTORCITY OF JACKSONVILLE, LTD.,
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FEDERAL DEPOSIT INSURANCE CORPORATION
AS RECEIVER FOR SOUTHEAST BANK, N.A., et al.,
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Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit sitting en banc after remand from this Court was issued on August 20, 1997; is reported at 120 F.3d 1140; and is reproduced in the Appendix at 1a-10a, infra. The previous opinion of the court of appeals sitting en banc was issued on May 8, 1996, and is reported at 83 F.3d 1317 (11th Cir. 1996). No. 96-106 Pet. App. 1a-55a.[1] The panel opinion of the Eleventh Circuit was issued December 5, 1994, and is reported at 39 F.3d 292 (11th Cir. 1994). No. 96-106 Pet. App. 56a-73a. The initial Order of the United States District Court for the Southern District of Florida dismissing petitioners' complaint was issued on November 25, 1992 and is included in No. 96-106 Pet. App. at 76a-83a; a second order denying petitioners' motion for rehearing and for leave to amend their complaint was issued on May 10, 1993. No. 96-106 Pet. App. 74a-75a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on August 20, 1997. On November 5, 1997, Justice Kennedy extended the time for filing this petition to and including December 18, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1823(e)(1) of the Financial Institutions Reform,

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[1] Because the prior opinions were reproduced in the first petition for certiorari filed by Hess, the Clerk's office authorized the lodging of ten copies of that appendix in lieu of reprinting those materials. References to that set of appendices will be to "No. 96-106 Pet. App. __a".

Recovery, and Enforcement Act of 1982 ("FIRREA") provides:

> No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance Corporation (FDIC)] in any asset acquired by it under this section or section 1821 of this tile, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement --
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1821(d)(9)(A) provides:

> [A]ny agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC].

12 U.S.C. § 1821(d)(2)(H) provides:

> The [FDIC], as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

STATEMENT OF THE CASE

Since this case was last before the Court about one year ago, the then-acknowledged conflict between the Eleventh Circuit in this case and other circuits concerning the continuing vitality of an "evolving" D'Oench doctrine[2] based on federal common law principles has widened and deepened. Thus, in addition to the Eighth and D.C. Circuits, the Ninth Circuit has now expressly rejected the holding of the Eleventh Circuit in this case. On the other hand, the Fourth Circuit has expressed its agreement with the Eleventh Circuit. Moreover, the Eleventh Circuit's decision again was rendered en banc and that court categorically rejected the FDIC's efforts to use FIRREA to bolster the Court's D'Oench holding. Thus, the Eleventh Circuit's most recent pronouncements eliminate any realistic prospect that the extraordinary division among the Circuits can be resolved without intervention by this Court.

Under ordinary circumstances the disarray in the law embodied in the disparate decisions of the courts of appeals would be more than sufficient to justify certiorari. Indeed, in an earlier era, a less severe conflict concerning the role of the common law under FIRREA was more than sufficient to persuade the Solicitor General to acquiesce as a respondent in a grant of certiorari. See Brief of the FDIC on petition for writ

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[2] D'Oench, Duhme & Co., v. FDIC, 315 U.S. 447 (1942).

of certiorari, O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) (where the government acquiesced on a similar issue with merely a split between the Fifth and Ninth Circuits). In the wake of O'Melveny and Atherton v. FDIC, 117 S. Ct. 666 (1997), the federal government has become demonstrably less comfortable defending in this Court the litigating positions it successfully advances in the courts of appeals. For instance, in response to Hess's previous petition, the Solicitor General went to extraordinary lengths to avoid plenary review by this Court, notwithstanding the unquestionable need for some measure of uniformity on the question of the status of D'Oench. If anything, the need for guidance has increased since the prior petition was filed and thus the Court should grant this petition now and finally resolve the fate of D'Oench and its still-evolving doctrine.

FACTUAL BACKGROUND

This case arises out of unchallenged allegations that a Florida bank breached its promise and tortiously and directly caused the failure of petitioner David S. Hess's business at a cost of $1.4 million.[3] In 1986, Hess, along with his brother, first explored the possibility of a new kind of automobile business -- a used car dealership that had modern, upscale services and facilities similar to those of a new car dealership. No. 96-106 Pet. App. 85a (photograph).

As a cardiologist, Hess had been a longstanding customer of the Jacksonville office of respondent Southeast Bank, N.A., in whose place the FDIC now stands as a receiver. Hess negotiated with Southeast's Jacksonville office regarding

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[3] The facts as stated in this petition are taken largely from the Eleventh Circuit's decision and from the allegations in petitioners' Amended Complaints, all of which are assumed true on appeal from a motion to dismiss.

financing for the car dealership, and this office provided all the financing needed except the "floor-plan financing" necessary for ongoing inventory purchases. For floor-plan financing, the Jacksonville office referred Hess to Southeast's Miami office, which, he was told, had the necessary expertise in this specialized financing.

Southeast's Miami office showed great interest in providing floor-plan financing for Hess's business, which was named Motorcity. A Southeast officer, David Feigenbaum, informed Hess that Southeast had handled the Miami floor plan for the largest car dealership in the country. Hess made it clear that he and his brother were inexperienced and would be absentee owners, busy with their professional practices. Southeast and Hess discussed the importance of preventing a problem unique to financing the inventory of a car dealership -- "out-of-trust" sales. (As each car was sold, Motorcity was obligated to repay to Southeast the portion of the loan designated for that particular car, plus interest. Failure to repay the loan after each car is sold renders the sale "out of trust.") Southeast represented that it would conduct periodic audits and contact Hess immediately upon discovering any out-of-trust sales.

In April 1987, Southeast issued a commitment letter of credit not to exceed $750,000, with $375,000 of collateral in the form of a certificate of deposit. Two months later, Motorcity and Southeast executed a floor-plan financing agreement.

Motorcity opened for business in September 1987. Shortly thereafter, Southeast began conducting monthly audits of the dealership's floor plan through an independent auditor. According to Southeast's own documents, it quickly learned that numerous out-of-trust sales were occurring and that these

sales could result in the closure of Motorcity. In breach of its promise, nobody at Southeast ever informed Hess about this precarious situation.

Southeast did contact Hess about other irregularities, all of which Hess addressed. For example, after being notified by Southeast, Hess corrected a discrepancy between the book value and the price paid by the dealership for a vehicle. Southeast even recommended that Motorcity hire certain employees, and Motorcity followed those recommendations.

In 1988, Southeast compounded its breach by extending Motorcity's credit, while telling Hess that additional credit was necessary only because of the size of the inventory. In fact, it was the out-of-trust sales that made the extension appear to be necessary. Feigenbaum even telephoned Hess on several occasions to report that Southeast had received "good" floor-plan reports.

In early 1989, a newly hired general manager at Motorcity informed Hess that the dealership was "out of trust" more than $400,000. Virtually the entire time Southeast had audited Motorcity, the previous managers of Motorcity had engaged in out-of-trust sales, diverting the money to pay substantial bonuses to themselves. Hess immediately notified Southeast. Southeast's response was to send Feigenbaum to Jacksonville to inspect the inventory. Feigenbaum's inspection confirmed what Southeast's documents already revealed -- there were significant out-of-trust sales -- and showed, moreover, that the out-of-trust amount might exceed the collateral. Accordingly, Southeast demanded payment, and in February 1989, Southeast seized control of Motorcity's bank accounts, vehicles, and titles, shut down the floor plan, and exercised control over the sale of all vehicles at Motorcity.

PROCEDURAL BACKGROUND

As the FDIC concedes, by April 30, 1990, Hess had fully repaid every obligation owed to Southeast associated with the Motorcity financing. Thereafter, in October 1990, petitioners filed this action against Southeast in Florida state court, alleging breach of oral agreement, breach of fiduciary duty, and negligence. That complaint withstood the defendants' motion to dismiss under state law and discovery was proceeding. No. 96-106 Pet. App. 84a. A year after the complaint was filed -- one-and-a-half years after Hess repaid all of his loans -- Southeast was declared insolvent and the FDIC was appointed receiver. The FDIC substituted itself as defendant in this action and removed the case to the United States District Court for the Southern District of Florida. Southeast is under receivership, but is in the unusual circumstance of having a multimillion dollar surplus. All creditors with valid claims against the Southeast receivership are expected to regain their principal and may receive a portion of the interest.[4]

In September 1992, the FDIC moved to dismiss petitioners' action for failure to state a claim, arguing that the written loan agreement did not obligate Southeast either to conduct the audits or to notify Hess of any irregularities. The FDIC further argued that, to the extent petitioners were relying on oral promises or representations, their claims were barred under the federal common-law D'Oench doctrine, and a related statutory provision, 12 U.S.C. § 1823(e). Petitioners then requested leave to amend their complaint to make clear that they wished to assert tort as well as contract claims. On November 25, 1992, the district court granted the FDIC's

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[4] Trustee for Southeast Seeks to Distribute Bank Assets to Holders, Wall St. J., Apr. 4, 1994, at A5G.

motion to dismiss, agreeing that all claims based on any oral side agreement were unenforceable under both D'Oench and § 1823(e). The district court denied rehearing on May 10, 1993.

A three-judge panel of the Eleventh Circuit unanimously held that petitioners' tort claims fell within the "free standing tort" exception to D'Oench and therefore reversed the district court's judgment and remanded the case. No. 96-106 Pet. App. 56a-73a. The panel held that petitioners' claims "do not . . . implicate the records of regular banking transactions" and therefore are "protected from the bar of the D'Oench doctrine." Id. at 70a.

The Eleventh Circuit granted rehearing en banc, and affirmed the judgment of the district court. No. 96-106 Pet. App. 1a-55a. In doing so, the Eleventh Circuit expressly and squarely disagreed with the District of Columbia and Eighth Circuits on the viability of the federal common-law D'Oench doctrine, and set forth a novel and exceedingly narrow interpretation of this Court's decision in O'Melveny & Myers. The Eleventh Circuit specifically held that because Congress had not undertaken a "comprehensive examination" of the "the evolving common law D'Oench doctrine," which the Eleventh Circuit described as "vast," nothing in FIRREA or O'Melveny should be read to displace that doctrine, or to restrict its further evolution. No. 96-106 Pet. App. 24a, 25a (emphasis added). The Eleventh Circuit acknowledged: "We disagree with the analysis of the D.C. and Eighth Circuits and hold that the federal common law D'Oench has not been preempted by statute." No. 96-106 Pet. App. 14a; see also id. at 19a ("We disagree with Murphy's reliance on O'Melveny.").

In response to Hess's petition for certiorari, this Court vacated the en banc decision of the Eleventh Circuit and remanded the case for reconsideration in light of this Court's

intervening decision in Atherton v. FDIC, supra. See 117 S. Ct. at 760 (1997).

On remand, the court of appeals again ordered petitioners' claims dismissed on the basis of the D'Oench doctrine. The court still acknowledged that the circuits were hopelessly split on this issue. With respect to the effect of this Court's decisions in O'Melveny and Atherton, the court of appeals dismissed them as cases refusing to create new common law rules and instead found applicable this Court's decision in United States v. Texas, 507 U.S. 529 (1993), which requires Congress to act expressly to modify a specific federal common law rule. Thus, neither the codification of D'Oench in Section 1823(e) nor the enactment of FIRREA generally was sufficient to prevent the court of appeals from applying an "evolving" federal common law rule based on the principle of protecting the FDIC as the sole basis for dismissing petitioners' otherwise valid state law claims.[5]

STATUTORY BACKGROUND

The Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), fashioned a rule of federal common law barring state-law defenses against the FDIC that are based on secret agreements between a failed bank and its debtors. D'Oench

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[5] The court of appeals expressly rejected the FDIC's argument that FIRREA could not apply retroactively to displace the D'Oench doctrine, reasoning that the issue was irrelevant because FIRREA did not preempt D'Oench. App. 10a n.6. For the same reason, that court did not address petitioners' related argument that retroactivity is not the proper analysis when the issue is whether a statute has displaced the federal common law rule because federal courts must consider after-enacted statutes in deciding what, if any, role remains for federal common law. See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304, 309-310, 312 n.5 (1981); Murphy v. FDIC, 61 F.3d34, 40 (D.C. Cir. 1995).

involved a securities dealer who sold bonds to a bank. The bond issuer subsequently defaulted. To help the bank conceal the past due bonds in its records, the dealer executed promissory notes in the amount of the bonds. In return, the bank secretly agreed not to call for payment on the notes. Nonetheless, the bank carried the notes on its books as assets. When the bank failed, the FDIC sued for payment of the notes, and the dealer asserted the defense of lack of consideration. D'Oench held that to allow the dealer to rely upon the secret agreement in defense of payment would run contrary to the policy of protecting the FDIC and its fund against misrepresentations regarding the bank's assets. Writing for the majority, Justice Douglas fashioned a new rule of federal common law estopping the maker of a secret agreement from relying on the agreement as a defense to collection of a bank asset by the FDIC whenever the maker has "lent himself to a scheme or arrangement whereby the [FDIC] was or was likely to be misled." Id. at 460.

The specific rule of federal law created in D'Oench was itself fashioned in a statutory vacuum, see id. at 459, but was enacted by Congress eight years later. Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, § 13(e), 64 Stat. 873, 889 (codified at 12 U.S.C. § 1823(e) (1952)). The codification was both narrower and more expansive than the D'Oench opinion. On the one hand, the statute was more expansive to the extent that it applied to certain agreements even if the borrower had not participated in a scheme in which the FDIC "was or was likely to be misled." Compare D'Oench, 315 U.S. at 460 with 12 U.S.C. § 1823(e). At the same time, the statute's scope was narrower than the broadest interpretation of D'Oench's dictum, although it was broad enough to cover D'Oench's specific holding. While D'Oench created a judicial rule of equitable estoppel, § 1823(e) barred defenses only when explicit requirements of the statute were

met. For example, the statute applied to an agreement that "diminish[es]" an FDIC asset; it did not bar all claims arising out of unwritten agreements. 12 U.S.C. § 1823(e).

For decades, the Court had no occasion to address the effect of § 1823(e) on the ability of the federal courts to expand federal common law to invalidate claims that were permitted by § 1823(e). In fact, the next occasion this Court had to discuss D'Oench was in Langley v. FDIC, 484 U.S. 86 (1987). In Langley, a borrower sought to avoid payment on a note by claiming the failed bank had procured the note by misrepresenting the value of the underlying property. This Court held that § 1823(e) applied and used D'Oench only to interpret § 1823(e). Thus, Langley did not explicitly decide the issue of whether the statute prevented the further "evolution" of a common-law D'Oench doctrine. However, the Court did refer to D'Oench as the leading case in the area "prior to enactment of § 1823(e)." 484 U.S. at 92 (emphasis added); see Murphy v. FDIC, 61 F.3d 34, 39 (D.C. Cir. 1995). Most important, Langley indicated that if an agreement is permitted by § 1823(e) it "prevails even if the FDIC did not know of it . . . . It would be rewriting the statute to hold otherwise." 484 U.S. at 95 (emphasis added). Shortly after Langley, the Court described borrower claims against a federal receiver based on a savings and loan's oral agreements and torts as governed by "state law." Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 577, 578, 585 (1989).

In 1989, § 1823(e) was modified with the enactment of FIRREA. FIRREA adopted several expansions to the provision enacted in 1950. For example, § 1823(e) was extended to protect the FDIC in its capacity as receiver of a failed bank, to the Resolution Trust Corporation (RTC) in either receiver or corporate capacity, and to bridge banks. Section 217(4) of FIRREA, Pub. L. No. 101-73, 103 Stat. 183, 256 (codified at

12 U.S.C. § 1823(e)) (FDIC as receiver); 12 U.S.C. § 1441a(b)(4)(A) (RTC); id. § 1821(n)(4)(I) (bridge banks). In addition, 12 U.S.C. § 1821(d)(9)(A) was added, and it provides that "any agreement which does not meet the requirements set forth in § 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC]." Id. § 1821(d)(9)(A) (emphasis added). FIRREA also added a gap-filling provision that requires the FDIC to "pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." Id. § 1821(d)(2)(H) (emphasis added).

This Court first considered the effect of FIRREA on the judicial creation of federal common law in O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994). At particular issue was the meaning and applicability of a FIRREA provision that states that the FDIC shall "by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution." 12 U.S.C. § 1821(d)(2)(A)(i). The defendant in O'Melveny maintained that, under this section, any defense available against a failed bank would likewise be good against the FDIC as receiver. 512 U.S. 86. The FDIC argued that the statute was nonexclusive and that federal common law was available to supplement the FDIC's rights. Id. This Court unanimously rejected the FDIC's argument and stated that it "would [not] adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." Id. at 85.

Most recently, the Court last Term in Atherton v. FDIC, 117 S. Ct. 666 (1997), again refused to apply a federal common law rule to govern bank directors' and officers' standard of care in tort actions brought against them after the bank was placed into receivership. The Court reaffirmed its general disapproval

of federal common law, particularly in areas where "Congress has enacted related legislation." Id. at 670. The Court found no federal interest that could justify adopting a rule that Congress itself had not enacted. Id. at 671-672.

REASONS FOR GRANTING THE PETITION

In this case, the Eleventh Circuit, sitting en banc, held that a "vast" and "evolving" common-law D'Oench doctrine continues to operate to this day, which provides extraordinary protections to the FDIC beyond those Congress has enacted. Thus, the court of appeals created rules under that "evolving" doctrine to bar petitioners' contract, fiduciary duty, and negligence claims. No. 96-106 Pet. App. 20a-28a., 53a. In so holding, the Eleventh Circuit expressly acknowledged that it was in direct conflict with decisions of the United States Courts of Appeals for the District of Columbia and Eighth Circuits. Id. at 14a (citing Murphy v. FDIC, 61 F.3d 34, 38 (D.C. Cir. (1995); DiVall Insured Income Fund Ltd. v. Boatmen's First Nat'l Bank, 69 F.3d 1398, 1402 (8th Cir. 1995)). The decision also conflicts with the subsequent holding of the Ninth Circuit in Ledo Financial Corp. v. Summers, 122 F.3d 825 (9th Cir. 1997).

Moreover, the Eleventh Circuit's decision to continue to create common-law rules to supplement, and thus alter, FIRREA is inconsistent with a controlling decision of this Court, O'Melveny & Myers v. FDIC, supra, as well as a long line of precedent on the severely limited role of federal common law, particularly when Congress has enacted related legislation. See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304, 313-14 (1980). The court of appeals' reliance upon United States v. Texas, as trumping the holdings of O'Melveny and City of Milwaukee does nothing more than reinforce the need for this

Court to clarify the law in this area. For all of these reasons, the Court should grant this petition.

I. THE DECISION BELOW EXPRESSLY AND SQUARELY CONFLICTS WITH THE DECISIONS OF THE DISTRICT OF COLUMBIA AND THE EIGHTH AND NINTH CIRCUITS.

A. As the Eleventh Circuit acknowledged, its holding creates a conflict among the circuits on the question whether an evolving common-law D'Oench has been preempted by statute. App. 3a, No. 96-106 Pet. App. 14a. The court stated: "We disagree with the analysis of the D.C. and the Eighth Circuits and hold that the federal common law D'Oench doctrine has not been preempted by statute." Id. This circuit split is most clearly presented by a comparison between the Eleventh Circuit's decision and the D.C. Circuit's decision in Murphy v. FDIC, 61 F.3d 34 (D.C. Cir. 1995), which presented facts strikingly similar to the facts here.[6]

Murphy concerned an investor in a failed real estate venture. The investor sought damages from the FDIC on the theory that the now-insolvent lender on the project had assumed the legal duties of a partner and had caused the venture to fail. Id. at 35. The district court in Murphy granted summary judgment in favor of the FDIC on the ground that the plaintiff was unable to point to a written agreement supporting his theory of liability and so was barred from asserting his claims by D'Oench. Id. at 35-36. The plaintiff asserted on appeal, however, that 12 U.S.C. § 1823(e) could be used to bar claims only where the FDIC could demonstrate that its interest in a specific asset would be diminished if the plaintiff were

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[6] Indeed, the conflict is highlighted by the fact that Murphy, like Hess in this case, was suing FDIC as receiver for Southeast Bank.

successful. Id. at 37. The plaintiff also asserted that no federal common-law D'Oench rule could be used to bar his claims because federal common law had been displaced by FIRREA. Id. at 36.

The D.C. Circuit agreed with the investor on both counts, holding that (1) the asset "diminish[ment]" requirement of § 1823(e) was not met where the loan had been paid off prior to the bank entering receivership,[7] and (2) under O'Melveny, FIRREA displaced the federal common-law D'Oench doctrine as a separate bar to claims against the FDIC. Id. at 37-39. The Murphy court stated, "[I]n O'Melveny & Myers[,] the Supreme Court does not flatly state that D'Oench has been preempted by the FIRREA, but it does set forth some more general propositions that, we think, lead ineluctably to that conclusion." Id. at 38. The court also noted that the O'Melveny Court had been "specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the D'Oench doctrine." Id. at 39. Whereas the Eleventh Circuit held O'Melveny to be inapplicable, the D.C. Circuit interpreted O'Melveny to hold that FIRREA excludes "overlapping federal common law defenses not specifically mentioned in the statute -- of which the D'Oench doctrine is one." Id.

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[7] Numerous other appellate courts have concurred with the D.C. Circuit's interpretation of the specific asset requirement of § 1823(e). See Ledo Fin. Corp. v. Summers, 122 F.3d 825, 830 (9th Cir. 1997); Inn at Saratoga Assocs. v. FDIC, 60 F.3d 78, 82 (2d Cir. 1995); John v. RTC, 39 F.3d 773, 776-77 (7th Cir. 1994); Murphy v. FDIC, 38 F.3d 1490, 1500 (9th Cir. 1994) (en banc); Villafane-Neriz v. FDIC, 20 F.3d 35, 40, 41 (1st Cir. 1994); Thigpen v. Sparks, 983 F.2d 644, 648-49 (5th Cir. 1993); Commerce Fed. Sav. Bank v. FDIC, 872 F.2d 1240, 1246 (6th Cir. 1989). The Eleventh Circuit expressly declined to disagree. No. 96-106 Pet. App. 29a-30a ("In light of our holding that the federal common law D'Oench doctrine has not been preempted, we need not decide whether §§ 1821(d)(9)(A) or 1823(e)(1) are limited to claims that impair the FDIC's interest in a specific asset.").

Similarly, the Eleventh Circuit's holding expressly conflicts with the decision of the Eighth Circuit in DiVall Insured Income Fund Ltd. v. Boatmen's First Nat'l Bank, 69 F.3d 1398 (8th Cir. 1995). In DiVall, the district court granted summary judgment against the plaintiff based on the federal holder-in-due-course doctrine. Id. at 1400. The Eighth Circuit reversed, applying O'Melveny to hold that the extensive provisions of FIRREA preempted a federal common-law D'Oench rule. The court held:

> When Congress enacted the comprehensive regulatory framework of FIRREA, it preempted the federal common law rules that restricted the claims and defenses which parties could raise against the FDIC. Accordingly, we hold that O'Melveny removes the federal common law D'Oench, Duhme doctrine and the federal holder in due course doctrine.

Id. at 1402.

The split among the circuits, which existed when this case was last before the Court, is further exacerbated by the Ninth Circuit's most recent decision in Ledo Financial Corporation v. Summers, 122 F.3d 825 (9th Cir. 1997). In Ledo the plaintiff alleged that it was defrauded pursuant to an unwritten agreement by the failed thrift. The FDIC as receiver sought dismissal of the fraud claim under both D'Oench and § 1823(e). The Ninth Circuit concluded that in light of O'Melveny and Atherton there was no basis to apply a federal common law rule of decision to bar the plaintiffs' claim that, like the one here, is plainly valid as a matter of state law. 122 F.3d at 828-29. See FDIC v. O'Melveny v. Myers, 61 F.3d 17, 18-19 (9th Cir. 1995) (per curiam) (D'Oench and lower court cases expanding D'Oench "have now been overruled by the Supreme

Court").[8] Similarly, the court rejected § 1823(e) as a bar because there was no "asset" of the bank involved, which is necessary for that provision to apply.[9]

In addition to these square conflicts among the circuits, the Third Circuit has "note[d] that the D'Oench, Duhme doctrine may no longer be a separate bar to plaintiffs' claims." DiMuzio v. RTC, 68 F.3d 777, 780 n.2 (3d Cir. 1995) (citing O'Melveny and Murphy). The First Circuit similarly has observed that "[a] circuit split appears to have developed over the question of whether [§] 1823(e) has preempted D'Oench." Adams v. Zimmerman, 73 F.3d 1164, 1168-69 n.2 (1st Cir. 1996) (comparing Murphy, DiVall, and FDIC v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986)). Thus, there can be no doubt that the decision below conflicts with the decisions of other courts of appeals on the validity of D'Oench.

The question presented here is not whether the specific holding of D'Oench itself should be overruled because that holding is codified in 12 U.S.C. § 1823(e). Rather, the question is whether, for claims Congress elected not to bar by statute, federal courts can fashion "evolving" federal common-law defenses limiting the civil liability of the FDIC as successor to a failed bank. If this Court agrees with the Eighth, Ninth and D.C. Circuits that Congress displaced any evolving common-law doctrine, no part of any "evolving" D'Oench "doctrine" that

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[8] Dicta in another Ninth Circuit opinion also questions the viability of federal common-law D'Oench. See RTC v. Kennelly, 57 F.3d 819, 822 n.3 (9th Cir. 1995) ("There is serious doubt whether D'Oench, Duhme survives O'Melveny & Myers v. FDIC.") (citation omitted).

[9] The Eleventh Circuit's decision has been followed in the Fourth Circuit, Young v. FDIC, 103 F.3d 1180 (4th Cir.), cert. denied, 118 S. Ct.329 (1997). See note 11, infra.

was not codified could serve as an independent bar to state-law claims that are permitted by the statute.

The question of the viability of federal common-law D'Oench is implicated in federal court cases several times each month. In the years since this Court decided O'Melveny, federal successors have relied on D'Oench, at least in part, in more than 100 reported cases.[10] Given the continuing reliance of federal successors, including the FDIC, on an evolving common-law D'Oench doctrine, this case presents an important and recurring issue that warrants review by this Court.

B. Because the FDIC is unwilling to defend in this Court the position it has taken in the courts of appeals that has generated the hopeless conflict among the circuits, it likely will oppose certiorari, notwithstanding the crying need to have this conflict resolved and notwithstanding the shameful spectacle of private litigants, whose situations are identical, being treated in diametrically opposite ways based solely on the happenstance of geography. The notion that a plaintiff prevails if he has the good fortune to sue a bank operating in the District of Columbia, but loses if he crosses the Potomac River and banks in Alexandria should be intolerable.

If this Court grants the petition and ultimately reverses the judgment below, petitioners' claims under Florida law can be properly considered on remand. The Florida state court judge, prior to the FDIC's entrance and removal to federal court,

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[10] Of the cases in Westlaw's database that cited "D'Oench" since June 14, 1994, well over 100 both involve a federal successor and discuss D'Oench as a bar to the plaintiff's claims. See also Capizzi v. FDIC, 937 F.2d 8, 11 (1st Cir. 1991) (Breyer, C.J.) ("anywhere from nearly 10 percent to about 20 percent of cases over the last five years in which the FDIC has been a party has involved the D'Oench defense in some manner").

denied the bank's motion to dismiss petitioners' state-law claims. No. 96-106 Pet. App. 84a. The Eleventh Circuit's lengthy discussion of the viability of petitioners' claims similarly indicates that, absent its interpretation of D'Oench, petitioners have stated viable claims under state law. No. 96-106 Pet. App. 39a, 41a, 42a n.22, 44a, 50a n.27, 51a, 53a.

Nevertheless, both in response to Hess's previous petition and in response to a prior petition from a Fourth Circuit case the FDIC conceded, as it must, that there is a conflict in the circuits, but still opposed certiorari.[11] Neither of the FDIC's primary arguments withstands scrutiny or justifies denying the petition in this case. Indeed, the Court's decision to grant Hess's previous petition in the face of these arguments itself suggests that they plainly do not warrant denying the petition.

First, the FDIC has asserted that FIRREA should not be applied retroactively and therefore the question of whether FIRREA "preempts" the evolving D'Oench doctrine that survives in the Eleventh Circuit is not squarely posed by this case, which arguably arises pre-FIRREA. The flaw in this

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[11] Although the opposition in Young made a couple of arguments that are unavailing (see p. 21, infra), it is at least understandable why the FDIC opposed certiorari in Young. There the facts underlying the plaintiffs' claims were exceedingly complicated; there was a serious question as to whether the complaint stated a claim for relief under state law; and the petitioners in Young never even asserted that they could avoid Section 1823. See Brief In Opp. of FDIC at 8 n.4, 13 n.8, Young v. FDIC, 103 F.3d 1180 (4th Cir. 1997) (No. 97-65). These are certainly legitimate grounds for urging the Court to postpone deciding the D'Oench issue, and no doubt explain why the Court denied certiorari in Young. Young v. FDIC, 118 S. Ct. 329 (1997). Here, by contrast, the claim is simple; the state court already has upheld Hess's claims against a motion to dismiss; and there is no question that Section 1823(e) and its companion Section 1821(d)(9)(A) are no obstacle to Hess's claims because there is no asset of the institution involved, as "required" by those provisions. See Langley, 484 U.S. at 95. See p. 26, infra.

argument is that the issue of what federal common law rule applies to a particular situation is not governed by the traditional retroactivity principles embodied in cases like Landgraff v. USI Film Products, 511 U.S. 244 (1994). Instead, in deciding whether to fashion a common law rule, the Court considers the state of the law at the time it decides what rule to apply because that approach is mandated by respect for Congress's authority. Murphy, 61 F.3d at 40; City of Milwaukee, 451 U.S. 304, 309-310 (1980). To ignore what Congress has said in response to a problem and adopt a contrary rule as a matter of federal common law is simply inconsistent with the Court's "commitment to the separation of powers . . . ." Murphy, 61 F.3d at 40, quoting City of Milwaukee, 451 U.S. at 314-315. Accordingly, retroactivity is a red herring. The issue posed is whether a federal court today is permitted to continue to tap into a "vast" and "evolving" federal common law in light of Congress's actions in FIRREA. That question is squarely posed in this case.[12]

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[12] The retroactivity argument has additional flaws that make plain the makeweight nature of this contention to avoid certiorari. First, Section 1821(d)(2)(H) states that all post-FIRREA receivers "shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." (Emphasis added). This is as express a command as Congress is capable of issuing that the FDIC is limited to statutory defenses. Incredibly, the Eleventh Circuit concluded that the provision did not apply because the term "valid obligation" incorporated the limitations of D'Oench. App. 9a. Of course, if new common law defenses are incorporated, then the statutory "prescriptions and limitations" that are supposed to apply become meaningless.

In addition, the FDIC adopts the transaction date as the relevant date for retroactivity purposes. O'Melveny indicates that the date of receivership is the critical date. 512 U.S. at 85. Because retroactivity remains irrelevant, however, the question of which event triggers a retroactivity inquiry is plainly beside the point.

The FDIC's alternative, but related argument is that the passage of FIRREA makes resolution of the D'Oench issue of only limited prospective significance. This is based on the FDIC's argument that Section 1821(d)(9)(A), contrary not only to its plain language, but also to this Court's discussion of the statute in Langley and the holdings of every court of appeals on the issue, does not incorporate the requirement of Section 1823(e), that an asset of the institution must be involved.[13] The problem with this argument is that in the Eleventh Circuit the law will always remain the same because the narrow interpretation of Section 1821(d)(9)(A) is no obstacle to the application of the broader interpretation of D'Oench that survives in that circuit en banc. Thus, panels in future cases, as in this case, will decline to consider the effect of FIRREA because that court now has concluded that FIRREA is utterly beside the point. Thus, the opinion on remand makes plain that the statute in no way undermines the compelling need to have the Eleventh Circuit's conclusions concerning the robust state of D'Oench's health reviewed, and this case presents the perfect vehicle for that plenary consideration.

II. THE COURT SHOULD GRANT THE PETITION TO DECIDE THE PROPER RELATIONSHIP BETWEEN UNITED STATES V. TEXAS, AND O'MELVENY AND CITY OF MILWAUKEE.

In addition to the clear need for a decision on D'Oench

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[13] See, e.g., Murphy, 61 F.3d at 38; John v. RTC, 39 F.3d 773, 776 (7th Cir. 1994) (describing the reading of section 1821(d)(9)(A) as limited in scope to transactions covered by section 1823(e) as "the only sensible reading"); Murphy v. FDIC, 38 F.3d 1490, 1500-1501 (9th Cir. 1994) (en banc); Thigpen v. Sparks, 983 F.2d 644, 649 (5th Cir. 1993) (describing the government's proposed interpretation as transforming the statute into a "meat-axe"). See also Ledo Fin. Corp., 122 F.3d at 828-30.

evidenced by the extraordinary conflict among the circuits, the court of appeals' holding in this case warrants review because it suggests that there is a lack of clarity in this Court's decisions concerning the basic relationship between actions by Congress and federal common law principles. In particular, the question of the relationship between United States v. Texas and the Court's decisions in O'Melveny and the line of cases including City of Milwaukee has at least confused the Eleventh Circuit. Thus, the need to clarify the law governing the general relationship between federal statutes and federal common law provides an independent rationale for granting review in this case.

A. The "Speak Directly" Test Does Not Apply Here.

In Texas, this Court held a pre-existing, on-point federal common-law rule of the Supreme Court is only preempted by a statute when Congress "speak[s] directly" to that issue. Id. at 534. The Eleventh Circuit wrongly concluded that this rule applies here. The "speak directly" test, however, applies only when there is an existing, directly-on-point common-law rule set forth by this Court prior to the statute.

In contrast, in this case, there was no established rule set forth by this Court barring claims like that of Hess when Congress first enacted 12 U.S.C. § 1823(e) or when Congress enacted FIRREA. Hess's claims are very different from those in D'Oench. This Court has emphasized in D'Oench itself, see 315 U.S. at 458-61, and in later decisions that D'Oench involved a borrower's attempt to use as a defense to liability its own knowing participation in a "secret agreement" that would likely deceive the FDIC as to a specific bank asset. Langley v. FDIC, 484 U.S. 86, 92 (1987); United States v. Yazell, 382 U.S. 341, 354 (1966). D'Oench specifically stated that the

question it addressed was whether "the liability of [the borrower] on the note involves decision of a federal, not a state, question." 315 U.S. at 456. D'Oench repeatedly emphasized that it was creating federal common law to address the use of a secret agreement "as a defense" to liability on a note that appeared in the bank's records as a noncontingent asset. Id. at 458-61.

Unlike the situation in D'Oench, here the FDIC was not and could not have been deceived about an asset of Southeast that involved Hess or Motorcity. Prior to the receivership, Hess had long since paid in full all of Motorcity's obligations to Southeast, and Hess's claim did not affect the amount he had previously owed the bank. Not only was no asset affected, there was also no secret. Hess filed his first complaint prior to Southeast's default and almost a full year before the FDIC's receivership. The only possible information about Hess or Motorcity that could have been useful to the FDIC was that he had filed suit against the bank. Hess had filed and served his complaint -- there was no secret.

Moreover, when Congress enacted FIRREA in 1989, the most recent indications from this Court -- Langley and Coit -- were that state law governed if a borrower's claims were not barred by federal statute. See supra, at 10-11. Langley and Coit demolish any notion that existing federal common law controlled such borrower claims prior to FIRREA.

By barring petitioners' claims, the Eleventh Circuit extended what it called the evolving" D'Oench doctrine, No. 96-106 Pet. App. 24a, and created a new rule of federal common law. Accordingly, the Eleventh Circuit's application of Texas is misplaced because this Court has held that it is "difficult to argue," to say the least that the "speak directly" test applies to

"a federal common-law remedy not yet recognized by this Court." City of Milwaukee v. Illinois, 451 U.S. 304, 327 n.19 (1980) (emphasis added).

B. FIRREA Satisfies Any "Speak Directly" Test.

In all events, FIRREA more than satisfies the "speak directly" test. First, as this Court's decision in Langley makes plain, D'Oench and § 1823(e) speak to the same subject. See Langley, 484 U.S. at 92-93. That subject is: When are agreements that are enforceable against the bank not enforceable against the FDIC as successor? Indeed, in its brief in O'Melveny to this Court, the FDIC stated that "both Section 1823(e) and D'Oench, Duhme address the question of whether a secret side agreement may constitute a defense to an action on a note by FDIC as receiver for an insured financial institution." Brief for the FDIC, at 38 (No. 93-489); see also id. at 43 (§ 1823(e) "does overlap the D'Oench Duhme doctrine substantially"). This Court has held that far less of an exact congruence satisfies the "speak directly" test. See, e.g., Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 620, 622 (1978) (holding that a provision in a noncomprehensive statute that "'recovery . . . shall be a fair and just compensation for the pecuniary loss'" precludes a common law rule that allowed awards for "loss of society") (quoting 46 U.S.C. § 762).[14]

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[14] The "speak directly" test does not require that the later statute have "affirmatively proscribed the use of federal common law." City of Milwaukee, 451 U.S. at 315; accord Texas, 507 U.S. at 534. See also Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991) (there is no requirement of a "clear statement" or "strict construction"). Rather, the "speak directly" test is satisfied by a statute's "natural meaning," Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952), or by an "implication" arising from the traditional tools of statutory interpretation, Astoria, 501 U.S. at 110. Here, § (continued...)

Second, if there was any basis for doubting that § 1823(e) speaks directly and precludes courts from supplementing or altering it with federal common law, that doubt was removed by Congress in 1989 when it enacted FIRREA. In particular, 12 U.S.C. § 1821(d)(2)(H) specifically commands that "[t]he Corporation . . . shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." (Emphasis added.) It is difficult to imagine a plainer statutory instruction against further judicial "evolution" of federal common-law D'Oench defenses -- a judge-made defense is not a "limitation[] of this chapter." Id. See note, supra.

O'Melveny addressed an analogous provision of FIRREA, 12 U.S.C. § 1821(d)(2)(A)(i). Section 1821(d)(2)(A)(i) provides that the FDIC as receiver "shall . . . succeed to . . . all rights, titles, powers, and privileges of the insured depository institution." (Emphasis added.) O'Melveny held that this provision means that the FDIC succeeds to the bank's "claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 512 U.S. at 87 (emphasis added). O'Melveny's reasoning also applies to § 1821(d)(2)(H), which ties the FDIC's obligations and defenses to those of the bank at least as clearly as § 1821(d)(2)(A)(i) does for the FDIC's rights and claims. Therefore, the reasoning in O'Melveny leads to "the conclusion that [§ 1821(d)(2)(H)] places the FDIC in the shoes of the insolvent [bank], to [pay its valid obligations] under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 512 U.S. at 87.

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[14] (...continued)
1823(e) satisfies the "speak directly" test because, among other things, § 1823(e) would be "superfluous" if evolving common law D'Oench continued to apply. Id. at 112.

A court that desires to create extra defenses for the FDIC outside of those in the statute does so out of whole cloth and in violation of the explicit provisions of § 1821(d)(2)(H). The decision below does great damage to both separation of powers and federalism by effectively writing its own statute that limits the FDIC's obligations as successor "in accordance with the prescriptions and limitations of this chapter or federal common law." 12 U.S.C. § 1821(d)(2)(H) (emphasized material added). Congress certainly knows how expressly to recognize supplementary federal common law when it so desires.[15] It chose not to do so here, and the federal courts have no license to disregard Congress's policy determination.

Third, O'Melveny holds that FIRREA is "comprehensive legislation." 512 U.S. at 85; see also United States v. Winstar Corp., 116 S. Ct. 2432, 2446 (1996) (plurality opinion) ("FIRREA made enormous changes in the structure of federal thrift regulation"); H.R. Rep. No. 101-54(I), at 415 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 211 (12 U.S.C. § 1821(d), as amended by FIRREA, is "comprehensive"); S. Rep. No. 101-19, at 313 (1989) (12 U.S.C. § 1821(d) is a "common code" of the FDIC's rights as receiver). By definition, "comprehensive" legislation covers a field such that it is the exclusive voice of federal law that speaks to all issues within that field. See City of Milwaukee, 451 U.S. at 319 ("comprehensive program" of statutory provisions "strongly suggests that there is no room for courts to attempt to improve

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[15] See, e.g. 42 U.S.C. § 6991b(d)(3) ("Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor to its owner or operator . . ."); id. § 9608(d)(2) ("Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor . . "); id. § 11046(g) ("Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law . . .").

on that program with federal common law"); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 788-89 (1952) (statute displaces prior federal common law when statute lists powers and omits power claimed under prior federal common law). Thus, the very comprehensiveness of FIRREA, particularly on the issues of a receiver's rights and obligations, speaks directly to -- and thus displaces -- any previously existing federal common law.

C. The Eleventh Circuit's "Speak Directly" Argument Was Rejected in O'Melveny.

In the end, the decision below accepts the exact FDIC argument that this Court rejected in O'Melveny. In O'Melveny, the FDIC conceded that the specific holding of D'Oench was limited to "a defense to an action on a note by FDIC as receiver," Brief for the FDIC at 38, O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) (No. 93-489), but argued that D'Oench stood for a broader "doctrine" and "principle" of federal common law. Id. at 41. The FDIC further argued that this broader doctrine was not displaced by FIRREA, id., because "'[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.'" id. at 36 (emphasis added) (quoting United States v. Texas, 507 U.S. 529, 534 (1993)). O'Melveny rejected the FDIC's argument that D'Oench created a "principle" far broader than its holding and that this evolving principle was not displaced by FIRREA. Having failed to persuade this Court in O'Melveny, the FDIC rehashed the same argument twice to the Eleventh Circuit, and the Eleventh Circuit incorrectly adopted it twice. This Court set the decision aside once. The court of appeals' decision to revive the conflict with O'Melveny, coupled with the conflict among the courts of appeals on the issue presented in this petition, warrants certiorari.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 18, 1997

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APPENDIX

APPENDIX A

[Filed Aug. 20, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4634

D. C. Docket No. 91-2305-CIV-HIGHSMITH

MOTORCITY OF JACKSONVILLE, LTD., a limited partnership, by and through its general partner Motorcity of Jacksonville, Inc., a Florida corporation, DAVID S. HESS,

Plaintiffs-Appellants,

versus

SOUTHEAST BANK N.A., DAVID FEIGENBAUM,
Defendants,

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver for Southeast Bank, N.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(August 20, 1997)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, and BARKETT, Circuit Judges, and KRAVITCH*, Senior Circuit Judge.

ANDERSON, Circuit Judge:

I. INTRODUCTION

In this case, appellants Motorcity of Jacksonville, Ltd. and David S. Hess (collectively "Motorcity") contend that the district court erroneously granted a motion to dismiss in favor of appellee Federal Deposit Insurance Corporation ("FDIC") based on the *D'Oench* doctrine.[1] *See D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676 (1942). A panel of this court vacated the district court's dismissal. *See Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 39 F.3d 292 (11th Cir. 1994).[2] On rehearing en banc, this court affirmed the district court's dismissal, holding that neither the Federal Deposit Insurance Act of 1950, Pub. L. No. 797, 64 Stat. 873,

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* Senior U.S. Circuit Judge Phyllis A. Kravitch participated in both the initial panel decision and the prior en banc decision in this case while she was in regular active service. She took senior status effective January 1, 1997, and has elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

[1] For a recitation of the facts underlying this case, see *Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A.*, 83 F.3d 1317, 1321-22 (11th Cir. 1996) (en banc).

[2] The panel decision was based on the free standing tort exception to the *D'Oench* doctrine and did not address the preemption issue discussed in our en banc decision.

nor the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, displaced the federal common law *D'Oench* doctrine. *See Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A.*, 83 F.3d 1317, 1327-34 (11th Cir. 1996) (en banc).[3] At the time of our en banc decision, the D.C. Circuit and the Eighth Circuit had held that FIRREA displaced the *D'Oench* doctrine. *See Murphy v. FDIC*, 61 F.3d 34, 40 (D.C. Cir. 1995) (holding that FIRREA supplanted the *D'Oench* doctrine); *DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995) (following the D.C. Circuit's holding in *Murphy* that FIRREA supplanted the *D'Oench* doctrine. Since the time of our decision, the Fourth Circuit has held that FIRREA does not displace the D'Oench doctrine. *See Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) (following the holding in our en banc *Motorcity* decision that FIRREA does not abrogate the *D'Oench* doctrine). There is thus a split in the circuits on this issue. *See FDIC v. Houde*, 90 F.3d 600, 605 n.5 (1st Cir. 1996) (noting the split in the circuits).

The Supreme Court granted certiorari in this case, vacated our judgment, and remanded this case for further consideration in light of *Atherton v. FDIC*, _____ U.S. _____, 117 S. Ct. 666 (1997). *Hess v. FDIC*, _____ U.S. _____, 117 S. Ct. 760 (1997).

II. DISCUSSION

In *Atherton*, the Resolution Trust Corporation ("RTC") sued officers and directors of a federal savings association

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[3] We also reaffirmed that the *D'Oench* doctrine is not limited by a specific asset requirement, held that the free standing tort exception to the *D'Oench* doctrine does not apply to this case, and held that Motorcity does not have a viable state law claim. *Id.* at 1336, 1338, 1345.

("bank"), which had gone into receivership with the RTC as receiver. *Atherton*, 117 S. Ct. at 669. The RTC claimed that the bank's officers and directors had violated the legal standard of care which they owed to the bank. *Id.* The issue in *Atherton* was whether courts should look to state law, to federal common law, or to 12 U.S.C. § 1821(k), a provision of FIRREA, to determine what the standard of care is for federal bank officers and directors. *Id.* The Court held that state law determines the standard of care so long as the state standard is stricter than the gross negligence standard set forth in § 1821(k). *Id.* at 674. The Court explained that § 1821(k) sets a gross negligence floor which applies if the state standard of care is less strict. *Id.*

In reaching this conclusion, the Court first set § 1821(k) "to the side" and asked "whether, were there no such statute, federal common law would provide the applicable legal standard." *Id.* at 669-70. The Court recognized that it had articulated in *Briggs v. Spaulding*, 141 U.S. 132, 11 S. Ct. 924 (1891), a federal common law corporate governance standard. *Atherton*, 117 S. Ct. at 670. However, the Court noted that *Briggs* was decided long before *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), held that there is no federal general common law. *Atherton*, 117 S. Ct. at 670. The Court then addressed the issue of whether *Briggs* survived *Erie*, and held that it did not. *Id.* After so holding, the Court examined whether the matter of corporate governance standards for federally chartered banks was one of the few and restricted areas in which judicial creation of federal common law was justified. *Id.* Applying post-*Erie* jurisprudence, the Court characterized the issue as being whether the use of state law would constitute a significant conflict with some federal policy or interest such that the creation of a federal common law rule would be appropriate. *Id.* The Court examined several asserted federal interests and concluded that the use of state law would not significantly conflict with or pose a threat to any of these interests. *Id.* at 673. The Court explained that "[t]he federal

need [in this case] is far weaker than was present in what the Court has called the 'few and restricted instances' . . . in which this Court has created a federal common law." *Id.* (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 313, 101 S. Ct. 1784, 1790 (1981)).

The Court thus overruled *Briggs*, declined to create a new federal common law rule, and concluded that "[t]here is no federal common law that would create a general standard of care applicable to this case." *Id.* at 674. Having concluded that there was no applicable federal common law, the Court then embarked on its only preemption analysis. The Court analyzed whether § 1821(k) set the sole standard of care for federal bank officers and directors, thus preempting state law, or whether it merely set a floor guaranteeing at least a gross negligence standard. Relying on the statute's purpose and legislative history and on the savings clause of § 1821(k), which states that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law," the Court held that the statute merely sets a gross negligence floor and that stricter state standards are not preempted. *Id.* at 674-76.

As the above discussion indicates, *Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine. It is true that the *Atherton* facts implicated the preexisting federal common law rule announced in *Briggs*. However, rather than addressing whether § 1821(k) displaced the *Briggs* rule, the Court explicitly set § 1821(k) to the side and addressed the different issue of whether *Briggs* survived *Erie*. After concluding that *Briggs* did not survive, thus leaving no federal common law regarding the standard of care, the Court obviously never reached or addressed any issue of

statutory abrogation of federal common law.[4] Thus, in *Atherton*, as in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048 (1994), the Court's analysis focused on determining whether the *create* federal common law.

By contrast, the federal common law rule at issue in this case, the *D'Oench* doctrine, was first articulated by the Supreme Court in 1942, after *Erie*. The issue in this case therefore is not whether the *D'Oench* doctrine survived *Erie*, but rather whether Congress intended FIRREA to supplant the previously established and long-standing federal common law *D'Oench* doctrine. As explained in our previous en banc opinion, *United States v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), applies in this context and provides a presumption in favor of retaining existing federal common law unless a statutory purpose to the contrary is evident. *See id.* at 534, 113 S. Ct. at 1634; *Motorcity*, 83 F.3d at 1330-34.

In order to transform this case into one for which the analysis of *Atherton* and *O'Melveny* is appropriate, this court would be required to overrule the Supreme Court's decision in *D'Oench*, which we cannot do. "Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court." Jaffree v. Wallace, 705 F.2d 1526, 1532 (11th Cir. 1983), *aff'd*, 472 U.S. 38, 105 S. Ct. 2479 (1985). The courts of appeals must follow Supreme Court precedent that has "direct application" in a case, even if it appears that the reasoning of the Supreme Court precedent has been rejected in other cases. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921 (1989). *See also Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir.), *cert.*

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[4] Consistent with this approach, *Atherton* does not even cite *United States v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), the most recent Supreme Court decision addressing whether Congress intended to abrogate a preexisting and long-standing federal common law doctrine.

denied, 117 S. Ct. 516 (1996). Only the Supreme Court has "the prerogative of overruling its own decisions." *Rodriguez De Quijas*, 490 U.S. at 484, 109 S. Ct. at 1922.

Moreover, we detect no indications that *D'Oench* is ripe for overruling. It is true that in its post-*Erie* jurisprudence, the Supreme Court has explained that the creation of federal common law is appropriate only in the "'few and restricted'" instances where the use of state law would pose a significant threat to or conflict with a federal policy or interest. *O'Melveny*, 114 S. Ct. at 2055 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S. Ct. 1441, 1445 (1963)). However, in *D'Oench*, the Court examined the Federal Reserve Act and identified a significant federal interest and policy which warranted the creation of a federal common law rule:

> Public policy requires that a person who, for the accommodation of the bank, executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced . . . . Those principles are applicable here because of the federal policy evidenced in this Act to protect [the FDIC] . . . from misrepresentations made to induce or influence the action of [the FDIC], including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures. . . . It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled.

D'Oench, 315 U.S. at 459-60, 62 S. Ct. at 680-81 (citations and internal quotations omitted).[5]

For the foregoing reasons, we decline to accept Motorcity's invitation to overrule *D'Oench*. With the *D'Oench* doctrine safely in place as a long-standing federal common law rule, we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States v. Texas*, and not that articulated in *Atherton* and *O'Melveny*. We continue to believe that the analysis set forth in our prior en banc opinion reflects the most reasonable reading of Congress's intent -- i.e., that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.[6]

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[5] We reject Motorcity's attempt to limit *D'Oench* to its narrow facts -- i.e., to cases involving a secret agreement related to a specific asset. Rather, we think it is clear from the *D'Oench* opinion that the Court applied a broader principle of law to the specific facts of that case. This reading is confirmed by the long-standing and well-established decisions of the several courts of appeals. Similarly, Motorcity's emphasis on the fact that it had paid off its loan before the FDIC took over Southeast Bank misconceives the federal policy of protecting the FDIC from misrepresentations. The bank examiners and the FDIC were misled from the moment Motorcity's written floor plan financing agreement appeared in the bank's records without the secret side agreement on which Motorcity seeks to rely.

[6] Having resolved the issue for which this case was remanded by the Supreme Court, we address in this footnote the several other arguments asserted by the parties on remand. We reject Motorcity's argument that Congress intended the Federal Deposit Insurance Act of 1950 to abrogate the *D'Oench* doctrine. Motorcity points to no indication, and our review has disclosed no indication, in the 1950 Act or its legislative history that Congress intended the 1950 Act to displace the *D'Oench* doctrine. *See Motorcity*, 83 F.3d at 1332. *See also FDIC v. McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986) ("The discussion of [§ 1823(e)] in the [1950 Act's] legislative history does not mention *D'Oench, Duhme*.")

(continued...)

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[6] (...continued)

Motorcity also contends that § 1821(d)(2)(H) indicates that Congress intended for FIRREA to displace the *D'Oench* doctrine. Section 1821(d)(2)(H) provides that "[t]he Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." 12 U.S.C. § 1821(d)(2)(H). Motorcity contends that this provision supplants the *D'Oench* doctrine because the *D'Oench* doctrine is not a "limitation[ ] of this chapter." We agree with the FDIC, however, that § 1821(d)(2)(H) does not indicate a congressional intent to displace the *D'Oench* doctrine. Instead, § 1821(d)(2)(H) assumes that the claims in question are valid and addresses only the manner in which valid claims are to be paid. We think it is clear that the *United States v. Texas* test for statutory abrogation of federal common law has not been met. We are satisfied that it cannot be said that there is an "evident" statutory purposes to overcome the "'presumption favoring the retention of long-established and familiar principles.'" *United States v. Texas*, 315 U.S. at 534, 113 S. Ct. at 1634 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014 (1952)).

Although not argued in its letter brief on remand, the FDIC has recently issued a Statement of Policy stating that 12 U.S.C. §§ 1821(d)(9)(A) and 1823(e)

> should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, . . . these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 FEd. Reg. 5984, 5984 (1997). *But see Murphy v. FDIC*, 61 F.3d 34, 38 (D.C. Cir. 1995); *Thigpen v. Sparks*, 983 F.2d 644, 649 (5th Cir. 1993); *In re NBW Commercial Paper Litigation*, 826 F. Supp. 1448, 1464-65 (D.D.C. 1992). Of course, if the FDIC's position is correct, and if § 1821(d)(9)(A) applies to this case, then the FDIC would prevail without our needing to reach the preemption issue.

(continued...)

III. CONCLUSION

Having carefully reconsidered our decision in light of *Atherton*, we REINSTATE our prior en banc opinion published at 83 F.3d 1317, and we REINSTATE our judgment AFFIRMING the district court's judgment granting the FDIC's motion to dismiss.

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[6] (...continued)

Finally, the FDIC has argued for the first time on remand that FIRREA cannot apply to this case because the alleged arrangement at issue occurred prior to FIRREA's enactment. Motorcity argues that FIRREA can apply to this case because the FDIC became the receiver for Southeast Bank after FIRREA's enactment. Because we conclude that FIRREA did not displace the *D'Oench* doctrine, and because we conclude that Motorcity's claims are *D'Oench*-barred, we need not delve into an analysis of whether FIRREA's application to this case would pose a retroactivity problem. *Cf. O'Melveny*, 114 S. Ct. at 2054-55 (declining to resolve the retroactivity question).